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[redacted]

[redacted]

Petitioner,

vs.

[redacted]
[redacted]
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF RESPONDENTS

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BEST AVAILABLE COPY

No. 89-7691

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

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QUESTION PRESENTED

WHETHER THE INSTRUCTION THAT THE JURY COULD PRESUME MALICE, GIVEN AT PETITIONER'S TRIAL, WAS HARMLESS ERROR UNDER ROSE V. CLARK?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The Petitioner, Dale Robert Yates, was indicted and convicted of the crimes of murder, armed robbery, assault and battery with intent to kill, and conspiracy. These crimes arose out of his participation in a scheme to commit the crime of armed robbery which occurred on Friday, February 13, 1981.

During the course of armed robbery, sixty-eight (68) year old Helen Wood was murdered by the Petitioner's accomplice and her forty-six (46) year old son, Willie Wood, was seriously wounded as a result of being shot twice by the Petitioner.

The undisputed testimony established that some ten days to two weeks prior to February 13, 1981, the Petitioner, David Eugene Loftis and possibly Henry Davis, had planned to burglarize various places in the vicinity of Greenville, South Carolina. The testimony clearly establishes that Yates along with one or both of the other men would, every two or three days, travel about the area of Greenville County "and look for some places that we might could break into, at night, while they was closed, some businesses or something; rob from there, would sell the stuff and get some money." (J.A. 35-36) According to Yates' own testimony at trial, they "weren't having too

much luck" at finding a place to burglarize "a lot of the places had burglar alarms and . . . taped glasses and windows and such." (J.A. 36) After having little luck finding an appropriate place to burglarize, Yates testified that they began to discuss the possibility "that we might could rob someone." (J.A. 36) Concrete plans to carry out an armed robbery began to formulate on Thursday, February 12, 1981. (J.A. 6, 36-37) Once the discussion turned to robbery, Davis mentioned that he had a knife that could be used as the weapon. However, Yates testified that "[w]e decided that we would need a gun to persuade whoever was behind the counter to give us the money." (J.A. 37, 6) Petitioner Yates testified that it was his idea that they should get a gun and that they could obtain one from his brother. The other men agreed and the three went to Petitioner's brother's home where they obtained the pistol which

was used in the armed robbery. (J.A. 6-8, 38-39) The night of February 12, 1981, the three men stayed together in Henry Davis' apartment. (J.A. 9, 40) The next morning on February 13, 1981, the three men left Davis' apartment and rode around together "and went looking for some suspectable [sic] places to rob." (J.A. 41, 9) After driving around most of the early part of the day without finding a suitable place to rob, the three eventually found themselves at a local mall where the girlfriend of Loftis worked. Loftis left Yates and Davis in the vehicle while he went into the mall to see his girlfriend. Shortly thereafter, Yates went into the mall to persuade Loftis to come with them so that they could carry out their plans to commit the robbery. Loftis refused to leave indicating that he had to talk to his girlfriend and that Yates and Davis should return at approximately 5:00 pm and then

they could commit the robbery. (J.A. 12-14, 44-46) Yates and Davis left Loftis at the mall some time around 3:00 pm. (J.A. 14, 46)

After leaving Loftis at the mall, Davis and Yates continued to drive around and look for possible places to rob. (J.A. 46) The two men eventually arrived at Wood's Store and decided to rob it without Loftis' help. (J.A. 51-55) At the time of the armed robbery, the only persons in Wood's Store were Willie Wood and his mother, Helen Wood. Mr. Wood was standing behind the counter next to the cash register and his mother was in a back room of the store out of sight. (J.A. 16-17) Shortly after walking in, Yates and Davis confronted Willie Wood. The testimony is undisputed that Yates was in possession of the pistol, Davis the knife. As the two men confronted Mr. Wood; Yates pointed the pistol at him and Davis brandished the knife. Yates spoke first and

demanded that Wood give them his money. Davis then repeated the demand. Upon removing the money from the cash register, Wood placed it on the counter and Davis picked it up. After picking up the money, Davis then handed it to Yates. The total amount of the money was approximately $3,000.00. According to the undisputed evidence in the record, Davis then demanded that Mr. Wood bend over the counter. Wood refused, stepped backward and suddenly Davis shouted for Yates to shoot. Yates then took aim and fired two shots at Mr. Wood. Wood was struck in the hand and chest by one of the bullets. Wood's mother, apparently hearing the shots, came out of the back room and shouted "[w]hat's going on out there?". Yates testified that he said to Davis "let's go" while turning around and heading out of the store. However, at approximately the same time Yates fired the two shots, Davis was moving around the end of the counter and

going after Mr. Wood with the knife. Apparently, as Davis approached Mr. Wood with the knife, Mr. Wood was trying to get away but was caught by Davis. Wood testified that "he [Davis] was on my back when we ended at the end of the counter before we got out into the aisle". During his testimony, Mr. Wood emphasized the fact that he did not fall after being shot by Yates, it was then that Davis came around the counter after him with the knife. (J.A. 25) Wood also re-emphasized the fact that once Davis started around the counter after him, he attempted to move away. Wood testified "I watched him because he came around the counter and started after me. And I know'd he was going to stab me in the back." (J.A. 29, 19) Wood testified that no sooner was Davis on his back than his mother arrived and attempted to grab him and pull him off. In the brief scuffle which ensued, the three "stumbled around the

counter, out into the aisle." (J.A. 19) At that time, Mr. Wood was trying to get to his pistol, which he wore as a sidearm under his coat. (J.A. 19) After struggling to pull the coat up, Wood managed to get the gun out and "started shooting [at Davis] and just pushing him on back until he couldn't go no further against the shoe boxes there. The last shot I fired, he hollered and hit the floor and the knife fell out of his hand." (J.A. 19) As soon as Davis fell, Mr. Wood noticed that his mother was on her hands and knees and she said "I believe I am dying." and blood appeared to be spurting out of her heart. Mr. Wood went to the phone and called emergency medical personnel and the sheriff's office who later came to the scene. Helen Wood died of her injuries. (J.A. 17-20, 55-57) Ms. Wood was fatally stabbed by Davis during the scuffle between herself, Mr. Wood and Davis. (J.A. 31-32)

Meanwhile, Yates appears to have run out of the store shortly after shooting Willie Wood and at about the same time the scuffle between Mr. Wood and Davis began. Yates testified that he ran out of the store and around the front of the car to the passenger side where he opened the door and got in. Yates testified that he got in the car with the money and was waiting in the passenger side for Davis to come out. After moments passed and Davis did not come out, Yates thought "'Well, he caught Henry. He grabbed Henry. No use me staying here and getting caught.' So, I jumped over under the wheel, put the car in drive, and left." (J.A. 57-58, 82)

Shortly after Yates made his getaway and the police arrived on the scene at Wood's Store, an all points bulletin was issued for the car which Yates was driving. Before Yates was able to escape the vicinity, his vehicle was noticed by

officers of the Greenville County Sheriff's Department who finally stopped Yates after a high speed chase. The record below reveals that after stopping his vehicle at the end of the high speed chase, Yates ran from the vehicle with the pistol and money in hand. He ran into some nearby woods where he was apprehended. A search of the area that Yates traveled through the woods uncovered a small paper sack containing the money stolen from the store as well as the pistol used by Yates. The paper bag was found concealed under some pine straw. (R. 961-987)

The basics of the procedural history of this case are set forth in the Petitioner's Statement of the Case and at J.A. 99-158.

SUMMARY OF ARGUMENT

First, Respondents maintain that the appropriate standard of review in determining whether Sandstrom error is harmless beyond a reasonable doubt was adequately set forth by this Court in Rose v. Clark, 478 U.S. 570 (1986). In Rose, the question presented was "whether the harmless error standard of Chapman v. California 386 U.S. 18 (1967), applies to jury instructions that violate the principles of Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985)." Id. at 572 In Rose this Court resolved this issue in the affirmative. Because Chapman permits a reviewing Court to look at the whole record, including the testimony and evidence presented, in determining whether error is harmless, the State Supreme Court utilized the appropriate standard below. (J.A. 149)

The Court below properly focused on Davis' malice in determining whether the

instruction that the jury could presume malice was harmless. The error in the Petitioner's argument is that he neglects to define the term "malice" as it is understood in South Carolina law. "Malice" as the term is properly understood, is neither the intent to kill, nor motive. It is because Petitioner obscures the definition of malice and at times makes it appear as though malice is the equivalent of the intent to kill that he is able to argue that the evidence of Davis' malice was not so overwhelming as to make the challenged instruction harmless beyond a reasonable doubt. When malice is properly understood as "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief" is clear that the evidence of Davis' malice is in fact overwhelming. State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941).

When malice is properly distinguished from the intent to kill and motive, the Petitioner's arguments fail. From the facts of this case, it is undisputed that Davis had not only engaged in the lengthy planning of an armed robbery, but participated in its execution. The facts of this case also undisputedly show that it was Davis who went after Willie Wood with a knife after Wood was shot by Yates. Testimony also reveals that Wood was trying to get away from Davis as Davis approached him with a knife. Petitioner's claim that Davis was not acting maliciously as that term is defined in the law of South Carolina is totally without foundation. Whether or not Davis had a specific intent to stab and kill Helen Wood is irrelevant. The question is whether Davis had a malicious state of mind at the time he killed Ms. Wood, not whether he specifically intended her death. For this reason, the jury instruction in question had

no bearing on whether or not the jury could have found Davis' stabbing of Helen Wood to be an accident. The challenged jury instruction did not require the jury to presume an intent to kill, but to presume malice which is not the same thing as the intent to kill.

Instructions given to the jury on the law of accomplice liability are sufficiently clear so that a reasonable jury would have understood that it was necessary to make a finding as to Davis' malice in order to convict Yates of murder. (J.A. 96-98) Second, even assuming that Petitioner is correct in arguing that the jury instructions as given would have focused the jury on Yates' malice, the improper presumption charge is still harmless because the evidence of Yates' malice is also so overwhelming that no reasonable juror could have concluded that it did not exist. Petitioner seems to argue that once the

instructions focused the jury's attention upon the issue of Yates' malice, then the improper presumption would have prevented the jury from properly considering two important facts regarding his mental state. As stated by Petitioner these facts pertain to his intent in agreeing to help Davis carry out an armed robbery which involved the possible taking of another life, and whether he had sufficiently withdrawn from the criminal scheme prior to the killing so as to relieve him of liability for the murder. (Petitioner's Brief p. 17) Once malice is properly understood as being distinct from the intent to kill it is clear that the evidence is overwhelming regarding Yates' malice. Specifically, under the law of accomplice liability in South Carolina, one need not intend or even entertain the actual expectation that a life may actually be taken in order to be convicted of murder. (J.A. 150) As regards to the issue of

withdrawal, there is simply no evidence in the record whatsoever that Yates withdrew as withdrawal is understood under South Carolina law. (J.A. 98) The only evidence in the record is that Yates was still involved in the criminal enterprise even after he left the store. The undisputed evidence is that Yates entered the passenger side of the car with the money in hand. He then waited for Davis to come out so that they could make their escape together. He then drove away, not in an effort to abandon the criminal enterprise, but because he believed that something had happened to Davis and so that he could avoid capture. See, Respondent's Statement of the Case, supra. That Yates had not abandoned the criminal enterprise upon leaving Wood's Store was also made evident by the fact that he took the money out of the store with him and attempted to hide it in the woods prior to being apprehended by the police. See,

Respondent's Statement of the Case, supra. There is simply no evidence that Yates withdrew or ever intended to withdraw from the criminal enterprise.

ARGUMENT

I.

In determining whether a Sandstrom error is harmless, a reviewing Court should follow the standard set forth in Chapman and look to the entire record to determine if the evidence presented is so overwhelming on the element presumed that no reasonable juror would have had to rely on the improper presumption to find the presumed element.

In Francis v. Franklin, 471 U.S. 307 (1985) and Rose v. Clark, 478 U.S. 570 (1986), this Court set forth the standard for determining whether a jury instruction constituted Sandstrom error, and if so, whether that instruction was harmless beyond a reasonable doubt. In determining whether a particular jury instruction violates Sandstrom, the test is two-fold.

> Analysis must focus initially on the specific language challenged, but the inquiry does not end there. If a specific portion of the jury charge, considered an isolation, could reasonably have

> been understood as creating a presumption that relieves the State of its burden of persuasion on an element of the offense, the potentially offending words must be considered in the context of the charge as a whole. Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. [citations omitted] This analysis "requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction."

Francis, 471 U.S. at 315. It was not until this Court's decision in Rose that the issue was squarely raised as to "whether the harmless-error standard of Chapman v. California [citation omitted], applies to jury instructions that violate the principles of Sandstrom v. Montana [citation omitted] and Francis v. Franklin [citation omitted]." Rose, 478 U.S. at 572. The majority of the Court in Rose concluded specifically that the Chapman harmless error

standard was applicable in cases involving Sandstrom error.[1] Id. at 584 Once the test

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[1]Many of the federal Courts of Appeals are in accord:
Quigley v. Vose, 834 F.2d 14 (1st Cir. 1987);
Payne v. LeFevre, 825 F.2d 702 (2nd Cir. 1987);
United States v. Clemons, 843 F.2d 741 (3rd Cir. 1988);
Bates v. Blackburn, 805 F.2d 569 (5th Cir. 1986);
United States v. Mentz, 840 F.2d 315 (6th Cir. 1988);
Jacks v. Duckworth, 857 F.2d 394 (7th Cir. 1988);
Ruff v. Kincheloe, 843 F.2d 1240 (9th Cir. 1988);
McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988);
Myrich v. Maschner, 799 F.2d 642 (10th Cir. 1986);
Collins v. Zant, 892 F.2d 1502 (11th Cir. 1990) and
Lancaster v. Newsome, 880 F.2d 362 (11th Cir. 1990).

Many state courts are also in agreement:
People v. Bunyard, 756 P.2d 795 (Ca. 1988);
People v. Odle, 754 P.2d 184 (Ca. 1988);
State v. West, 568 So. 2d 1019 (La. 1990);
Alexander v. Texas, 757 S.W.2d 95 (Tex. Cr. App. 1988);
State v. Coleman, 544 A.2d 194 (Conn. 1988);
Hunter v. State, 740 P.2d 1206 (Ok. 1987);

enunciated in Francis is applied to the instruction and it is determined that the jury instruction taken as a whole contains Sandstrom error, then the reviewing Court must apply the Chapman standard to determine whether the Sandstrom error was harmless beyond a reasonable doubt.

> "Chapman mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." [citations omitted] The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." [citations omitted] . . . in cases of Sandstrom error, "the inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption."

Rose, 478 U.S. at 583. A careful reading of this Court's decisions clearly and

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State v. Jensen, 735 P.2d 781 (Ar. 1987) and
Morrison v. Holland, 352 S.E.2d 46 (W.Va. 1986).

unequivocally reveals that a majority of this Court has already concluded that the Chapman standard for determining harmless error is applicable in cases of Sandstrom error.[2]

In his brief, the Petitioner maintains that there is still some dispute regarding the proper standard to be used for determining harmless error in Sandstrom cases. (Petitioner's Brief pp. 35-36) In support of his position, Petitioner cites to the concurring opinion in Carella v. California, _____ U.S. _____, 57 U.S.L.W. 4731, 4733 (1989). According to the concurrence in Carella, the proper focus for determining whether Sandstrom error was harmless is not upon the whole record. Rather, the focus would appear to be more narrow in that it is limited only to the

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[2]This point is implicit in this Court's decision in United States v. Frady, 456 U.S. 152 (1982) and explicit in this Court's decision in Pope v. Illnois, 481 U.S. 497 (1987).

predicate facts underlying the erroneous presumption. The question then becomes whether "the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." Carella 57 U.S.L.W. at 4733. It is this test set forth in the concurring opinion in Carella which the Petitioner ultimately maintains should be applied to the facts of this case.

Respondents maintain the issue regarding the appropriate standard was conclusively resolved in Rose. This is clearly evident from a careful reading of the Rose decision. It appears that the very concerns and arguments raised by the concurrence in Carella were considered by a

majority of this Court in Rose and resolved in favor of the traditional Chapman test. Rose, 478 U.S. at 580-582 and 572 n. 1. Therefore, Respondents will argue that the Sandstrom error, if any, in this case was harmless beyond a reasonable doubt under the Chapman standard adopted by this Court in Rose. However, Respondents will also maintain that even applying the test set forth by the concurrence in Carella, the Sandstrom error in this case is still harmless beyond a reasonable doubt.

II.

The instruction that the jury could presume malice was harmless beyond a reasonable doubt.

A. The definition of malice and the nature of the presumption in this case.

In order to understand why the malice instruction in this case is harmless beyond a reasonable doubt one must first understand precisely how malice is defined and also that it is distinct from the intent to kill and motive. In this vein, it is important to keep in mind that the principle cases which the Petitioner relies upon to establish the incorrectness of the malice instruction here, Sandstrom and Francis, are cases which concern mandatory presumptions regarding the intent to kill, not malice as defined under the law of South Carolina and by the trial court in this case. Perhaps the clearest definition of malice in the State of South Carolina was set forth by the

State Supreme Court in State v. Heyward, 197 S.C. 371, 15 S.E.2d 669, 671 (1941);

> In its popular sense the term 'malice', conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual injured, but signifies general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse or extenuation, and malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse. (emphasis added)

With this definition clearly in mind, it can easily be seen that malice as defined in South Carolina law and by the trial court in this case is distinct from the intent kill and motive. As opposed to motive, malice does not require that one have ill-will or hostility toward a particular individual for any particular reason, rather it signifies a

mental state which is reckless of the lives and safety of others in general. Likewise, with the above definition of malice in mind, it is easy to see how it is distinct from an intent to kill. In order to fully understand the significance of the definition of malice and role which it plays in murder cases as such as this, it is important to keep in mind that under South Carolina law it is possible to commit an intentional killing with malice, which is murder, and to commit an intentional killing without malice, which is not murder.[3]

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[3]Voluntary manslaughter, which is a lesser included offense of murder in South Carolina, is an intentional killing without malice. It is the element of malice which distinguishes voluntary manslaughter from murder. State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978) and State v. Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984). Likewise, one can be convicted of murder even though one does not have the intent to kill, provided that one does have malice. State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672, 675 (1957) ("although it may be fairly assumed that there is no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard

In the course of the trial judge's charge he explained malice as follows:

> Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief . . . malice is implied or presumed by the law from the willful deliberate and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> I tell you, also, that malice is implied or presumed from the use of a deadly weapon. (emphasis added.)

(J.A. 96) Upon reviewing this language, the State Supreme Court noted two erroneous instructions:

> Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge chjarged the jury: "malice

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of human life, from which a jury could infer malice.") And State v. Webb, _____ S.C. _____, 389 S.E.2d 664 (1990).

> is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon ... [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

(J.A. 151)

Before proceeding to a detailed analysis of why the presumption charge in this case is harmless, it must be made clear that malice is defined as "a general malignant reck-lessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief". Heyward, supra.[4] Another point, obfuscated in Petitioner's Brief, which has now been made clear is that malice is not the intent to kill. It is

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[4]In its charge, the trial court stated, "[Malice] is something which springs from wickedness from depravity, from a depraved spirit, from a heart devoided of social duty, and fatally bent on creating mischief." (J.A. 96)

with this understanding that we proceed to the question of whether or not the trial court's charge on malice is harmless error.

B. Because the jury had only to find that Henry Davis, Petitioner's accomplice, acted with malice under South Carolina's law of accomplice liability to convict the Petitioner of murder, and because the evidence of Davis' malice is overwhelming, the improper malice instruction is harmless.

As the State Supreme Court noted, the key to understanding why the presumption was harmless is that it was Davis' malice which was most relevant and not Yates'.[5] (J.A. 151) First, the precise definition of malice set forth above and by the trial court below must be kept in mind. State v. Heyward, supra, and J.A. 96. The question then is whether Davis' actions show "recklessness of the lives and safety of

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[5]The State Supreme Court was duty bound to engage in a harmless error analysis. "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." United States v. Hasting, 461 U.S. 499, 509 (1983).

others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief."

State v. Heyward, supra. Following the standard set forth in Rose and Chapman, the issue is whether the evidence is so overwhelming as to Davis' malice, properly defined, that the reviewing court can say beyond a reasonable doubt that no reasonable juror would have had to rely on the improper presumption to find it. With malice properly defined and distinguished from the intent to kill, it is clear from the facts of this case that the only evidence in the record is that Davis did act with malice. Davis' specific intent to kill was unaffected by the presumptive language. Once again, and as noted above, the presumption here, unlike the presumptions involved in Sandstrom and Francis, did not direct the jury to presume the intent to kill from predicate facts, but rather malice which is

distinct from intent. The facts of this case undisputedly reveal that Davis was active in the planning and commission of an armed robbery. They reveal that he was armed with a deadly weapon, a knife, throughout the entire crime. The undisputed testimony in the record also reveals that it was Davis who directed Yates to shoot Willie Wood. The undisputed evidence in the record also indicates that after directing Yates to fire on Willie Wood, Davis went around the counter after Wood, presumably chasing him, and was in all probability attempting to stab him with the knife. It is this evidence which is overwhelming evidence that Davis had malice in his heart throughout the commission of this crime and at the time he fatally stabbed Helen Wood. At the risk of emphasizing the point too much, it is irrelevant whether or not Davis specifically intended to kill Ms. Wood. Davis did not need a specific intent to kill Ms. Wood to

be guilty of murder himself or to have acted with malice. Because the evidence is so overwhelming that no reasonable juror would have had to rely on the presumption in order to find malice, and because the presumptive language did not direct the jury to presume an intent to kill on the part of Davis, the State Supreme Court was correct in concluding that the error was harmless beyond a reasonable doubt. Given a proper definition of malice, it is clear that Davis could not have claimed that he stabbed Helen Wood by accident. Furthermore, because the presumption in question would have only focused the jury's attention upon Davis' malice and not his intent to kill Helen Wood, the jurors consideration, if any, of whether Davis accidentally stabbed Helen Wood would not have been affected by the presumption.

C. **The jury instructions on malice would not have misled a reasonable juror to focus on the Petitioner's malice to the exclusion**

of Davis' malice. Furthermore, the evidence of Petitioner's malice is so overwhelming as to make an improper malice instruction harmless.

As the State Supreme Court noted the key is the malice of Henry Davis. (J.A. 151) After setting out the elements of murder, including malice, for the jury's consideration, the trial court then specifically charged the jury "[a]nd it ultimately remains the responsibility of you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." (emphasis added) (J.A. 96-97) With language this plain and this evident, it is difficult to imagine how a reasonable juror could have interpreted this charge in such a way as to have not focused on Davis' malice. As this court noted in Francis, "[t]he Court presumes that jurors, conscious of the gravity of their task, attend closely

to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (emphasis added) Francis, 471 U.S. at 324, n. 9. Whatever else the jurors drew from the trial court's instructions they must have understood that it was necessary to consider Davis' malice in order to find Yates guilty of murder under the theory of accomplice liability. In this respect, the charge is crystal clear. Nothing in the charge could have led a reasonable juror to include that they did not have to find that Davis acted with malice in order to convict Yates.

Furthermore, given the trial judge's charge on the law of accomplice liability and the facts of this case, it is not possible that a reasonable juror could have disregarded that portion of the trial court's charge in finding Yates guilty of

murder. The jurors had to find Yates guilty of murder under the accomplice liability portion of the trial court's charge, they could have done nothing else given the undisputed facts of this case. The undisputed facts of the case are that Yates did not murder Helen Wood. On this point, the facts, the Petitioner and the Respondents are in complete agreement. Yates is guilty of murder only in so far as he is an accomplice with and aiding and abetting Henry Davis in the course of the armed robbery. Under these facts, the jurors had to find Yates guilty under the following portion of the charge:

> Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or

natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present, or participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused which proximately lead to the accomplishment of the criminal purpose. the commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commission of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or some ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original

> unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

(J.A. 97-98) Under this instruction, which under these facts absolutely must have been considered by the jury, the jury could not have erroneously convicted Yates as a result of the improper malice instruction. Once again, remembering the proper definition of malice and the precise language of the presumptive malice instruction, the improper charge would not have eclipsed the jury's consideration of the above referenced portion of the trial court's charge. Given the particular facts of this case, any reasonable jury would have had to have convicted Yates under the above referenced portion of the charge.

Assuming, but in no way conceding that a reasonable jury could have been misled by the trial court's instructions to focus on Yates' malice, the error is still harmless

beyond a reasonable doubt because the evidence of Yates' malice is overwhelming. Given the charge presented here, no reasonable juror could have focused on Yates' malice to the exclusion of Davis'. At worst, a reasonable juror would have interpreted the instructions in such a manner as to have concluded that it was necessary to find that Davis had malice, or that both Davis and Yates acted with malice. In essence, a reasonable juror under these instructions would have necessarily had to focus on Davis' malice. The only question is whether the instructions would have also permitted the reasonable juror to conclude that Yates acted with malice also. However, even assuming this interpretation, the evidence that Yates acted with malice - malice properly defined - is so overwhelming that no reasonable juror would have had to rely on the improper presumption to find malice.

The Petitioner argues that the improper malice instructions could have confused the jury with regard to two facts which are relevant to his guilt or innocence. The first, pertains to "whether Yates' intent in agreeing to help rob the Wood Store encompassed a probable homicide" and second, "whether Yates had sufficiently withdrawn from the criminal enterprise prior to the killing to free him from liability as an accomplice". (Petitioner's Brief p. 17). The Respondents will consider each of these facts in turn and how the alleged improper malice instruction might have affected the jury's consideration of them.

Regarding the first fact pertaining to whether Yates' intent to assist Davis in robbing the Wood's Store encompassed a probable homicide, the improper malice instruction could not have affected a reasonable juror's consideration of this fact. Once again, the appropriate

definition of malice must be kept firmly in mind. Malice is not the intent to commit a homicide, it is not the intent to kill. This is the very point which the Petitioner obfuscates throughout his entire brief. Furthermore, the intent that a homicide occur or the reasonable expectation on the part of an accomplice that a homicide is even reasonably likely is not a necessary element of accomplice liability for murder. First, regarding the definition of malice, it can be no doubt but that Yates acted maliciously - as the term is properly defined - in planning to commit an armed robbery, actually committing an armed robbery, threatening Willie Wood with a deadly weapon, and actually shooting him among other things. Yates clearly acted maliciously as malice is properly defined. The only evidence in the record is that Yates acted with malice. Also, as previously noted, the doctrine of accomplice

liability for murder does not require that the accomplice intend that a homicide occur or even reasonably expect that one is likely. The accomplice's, in this case Yates', subjective mental state regarding intent is not necessarily relevant. The doctrine of accomplice liability was succinctly stated by the State Supreme Court in its opinion below.

> Under State Law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide.

(J.A. 150) What is necessary under the doctrine of accomplice liability for murder is that the jury be charged that the crime, in this case armed robbery, which the parties combined to commit and/or the manner in which they committed it was such that a homicide could result as "a probable or natural consequence thereof." (J.A. 150)

The jury does not have to be charged that to find one guilty of accomplice liability for murder that the accomplice actually intended that a death result or subjectively expect that a death was likely. It was only necessary that the jury find that the crime which the parties combined to commit and/or the manner in which they committed it could lead to the death or killing of another individual. Once the doctrine of accomplice liability is properly understood, it is clear that Yates' subjective intentions regarding the taking of another life were not necessarily relevant. This was most recently reaffirmed by the State Supreme Court in its recent decision in Thrift v. State, _____ S.C. _____, 397 S.E.2d 523 (1990).[6] Given an appropriate understanding

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[6]In Thrift, the State Supreme Court approved the following charge on the doctrine of accomplice liability. "If two or more combine together to commit an unlawful act, such as robbery and in the execution of that criminal act a homicide is committed by one of the actors as a probable

of the definition of malice, as well as an understanding of precisely what is required under the doctrine of accomplice liability, it is clear that the Petitioner's intent regarding the possibility of a homicide is irrelevant and was not eclipsed as a result of the malice instruction.

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and natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. The common purpose may not have been to kill another, but if it was unlawful, as for instance to break in and steal and in the execution of the common purpose a homicide is committed by one as a probable or natural consequence of the acts done in pursuant to the common design, then all present participating in the unlawful common design are as guilty as the slayer." Thrift 397 S.E.2d at 526. While this case only raises issues pertaining the Petitioner's conviction not his death sentence, it is worth noting that the death sentence has been held not to be inappropriate in cases such as this. Enmund v. Florida, 459 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137, 152 (1987) (Eighth Amendment does not prohibit the death penalty for one "whose participation is major and whose mental state is one of reckless indifference to the value of human life.")

The next point which the Petitioner claims to have been eclipsed by an improper malice instruction pertains to whether he had sufficiently withdrawn from the criminal enterprise prior to the killing. Petitioner claims that the presumptive instruction prevented the jury from properly considering this and, therefore, his very guilt under the doctrine of accomplice liability is called into question. This is perhaps the most ludicrous of the Petitioner's claims. The trial judge below accurately set forth the law of withdrawal in his charge.

> One who is joined in a common design to kill or commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, notwithstanding any attempted withdrawal from the

> original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with resulting lack of responsibility for a homicide committed by a confederate.

(J.A. 98) As Respondents have noted several times earlier, given the proper definition of malice coupled with this charge on the law of withdrawal, there is simply no evidence of the Petitioner's withdrawal. No reasonable juror could have conceivably concluded that the Petitioner withdrew or ever intended to withdraw from the criminal enterprise. First, given a proper understanding of the definition of malice, it in no way affected the jury's

consideration of this issue. The record is clear and unequivocal in that the Petitioner ran out of Wood's Store with his pistol and the money in hand. He went to the passenger side of the vehicle, got in and waited on Davis. Nothing whatsoever about the Petitioner's conduct either inside Wood's Store or immediately outside is even suggestive of an intent or desire on his part to withdraw from the original criminal enterprise, which was armed robbery. The Petitioner left the store with the money, the gun and waited on his accomplice prior to driving away in order to avoid detection. Petitioner's own testimony at trial is that he left not in an effort to abandon the criminal enterprise, but because he believe his accomplice Davis had been caught and so that he could avoid detection and apprehension. Nothing whatsoever about Petitioner's behavior and conduct could possibly lead a reasonable juror to conclude

that he had any intention of withdrawing from the criminal enterprise as this is understood in the law. Furthermore, assuming but in no way conceding that the malice instruction had some bearing on the jury's consideration of the issue of withdrawal, the evidence of Yate's own malice, as properly defined, is so overwhelming that a reasonable juror would have found it in the absence of the presumption. As such, the presumption itself had no bearing on the issue of Yates' withdrawal.

D. Although the Chapman standard is the appropriate one to use in determining whether Sandstrom errors are harmless, the instruction here would be harmless even if the standard used is the one put forth in the concurrence in Carella v. California.

In Carella the concurrence noted that typical harmless error analysis under Chapman permitted and even required consideration of the trial record as a whole. However, the concurrence in Carella objected to this approach when dealing with errors of the Sandstrom type, and instead urged the Court to adopt the following test.

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings functionally equivalent to finding the element required to be presumed. The error is harmless because it is "beyond a reasonable doubt" [citation omitted], that the jury found the facts necessary to support the conviction.

Carella, 57 U.S.L.W. at 4733. Under this inquiry the focus is not upon trial record as a whole, but rather upon the predicate facts which form the basis for the presumption. The question then becomes whether the jury could not have found the presumed fact given the predicate facts which it is was required to find. Here, however, predicate facts and the presumed fact were so closely related as to make the finding of the predicate facts "functionally equivalent" to finding the presumed fact. Id. at 4733.

Petitioner argues that "[i]n this case, the mere facts that defendant used a deadly weapon and committed robbery - the predicate facts triggering the presumptions of malice - clearly do not themselves establish malice beyond a reasonable doubt." As with his other arguments, Petitioner's argument in this regard rests upon his failure to understand the proper definition of malice

and its implications. First, the trial court defined the phrase "deadly weapon" as follows:

> I tell you that a deadly weapon, within the meaning of the law is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

(J.A. 95) The trial court defined the crime of armed robbery, robbery committed with the use of a deadly weapon as follows:

> Ladies and gentlemen, armed robbery in this State is the felonious taking and carrying away of personal property or money of another person from his or her person or in his or her presence by violence or putting that person in fear and by the use of a deadly weapon. Robbery includes larceny, ... All of the elements necessary to constitute larceny are necessary to constitute robbery; and in addition to the taking of another person's property, it requires that it be taken by putting that person in fear and by the use of a deadly weapon.
>
> To make out the offense of armed robbery, it is necessary for the State to show that the money or personal propery of another person has been taken. And after taking it, it was carried away; that the

taking and carrying away was with the intent of depriving the owner of his property or money. Fourthly, that the money or property was taken from the person or another but it is sufficient in the law if it was taken from his presence, from the area in which he personally was. It need not be taken out of his pocket, but just from his presence.

Fifthly, the taking must not only be without the consent of the owner, but it was accomplished with violence or by putting the person in fear for his safety or well-being. The additional and last element of the charge of armed robbery is that such fear and violence was committed with the use of a deadly weapon; that is to say, the person or persons who committed the crime actually had and used a deadly weapon to obtain the possession of the property of another by putting him in fear for his safety by the use of that weapon.

(R. 1205-1206) Remembering that malice is defined as "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows the heart regardless of social duty and fatally bent on mischief" it is not difficult to see how the predicate facts of robbery with the use

of a deadly weapon clearly establish malice. Heyward, 15 S.E.2d at 671. With the crime of armed robbery and the phrase "deadly weapon" defined as they are under the law of the State of South Carolina, it is difficult to understand why and how the test set forth in the concurring opinion in Carella is not satisifed by the predicate facts of this case. While malice is not an element of armed robbery, it is difficult to see how armed robbery, as defined, could be committed by someone without malice. Because the crime of armed robbery cannot be committed without malice, even though malice is not an element of armed robbery, it is clear that the predicate facts here "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact [of malice]". Carella, 57 U.S.L.W. at 4733.

CONCLUSION

The Respondents maintain that the proper standard of review to determine wherther the Sandstrom errors are harmless is that set forth in Chapman v. California and approved by this Court in Rose v. Clark.

Applying the Chapman standard to this case, it is clear that the malice instructions are harmless beyond a reasonable doubt. Because the Petitioner has neglected to focus on the proper definition of malice and has confused it with the intent to kill, his arguments that the malice instructions improperly affected the jury's verdict must fail. Malice is not the intent to kill and when properly understood it is clear that the presumptive instructions on malice are harmless under Chapman and Rose. Specifically, evidence of Henry Davis' malice is overwhelming. No reasonable juror could have concluded that Henry Davis did not act with malice.

Because of the nature of the definition of malice the presumptive instructions did not in any way eclipse the jury's consideration of Davis' intent. In any event, Davis' specific intent to stab Helen Wood is not even controlling as to whether he is guilty of murder of South Carolina law.

Furthermore, the instructions on malice are not ambiguous as Petitioner argues. The instructions clearly focused the jury's attention on Davis' malice which was the key for purposes of the law of accomplice liability. However, assuming that the jury did consider Yates' malice, this could not have affected their verdict. This is so because, (1) the evidence of Yates' malice is also so overwhelming that no reasonable juror could have doubted it and, (2) malice as properly defined and as instructed has nothing whatsoever to do with Yates' intent that a homicide occur or his intent to withdraw from the criminal enterprise.

Because malice is distinguishable from intent, the presumptive instruction could not have adversely affected the jury's consideration of Yates' specific intent regarding whether or not a homicide would occur or his intent to withdraw.

Assuming but in no way conceding that the Carella concurrence is correct with respect to the appropriate standard to apply to Sandstrom error, the malice instruction is still harmless. Given the definition of "deadly weapon" and the crime of armed robbery, a juror could not find these predicate facts which are overwhelmingly supported by the record, and to fail find malice.

For all these reasons, the judgment of the Supreme Court of the State of South Carolina should be affirmed.

Respectfully submitted,

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December 17, 1990
Columbia, South Carolina.

No. 89-7691

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

AFFIDAVIT OF FILING

PERSONALLY appeared before me, MILLER W. SHEALY, JR., who being duly sworn, deposes and says that he a member of Bar of this Court and that on this date he filed the original and forty copies of Brief of Respondents in the above captioned case by depositing same in the United States Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 17th day of December, 1990.

MILLER W. SHEALY, JR.

SWORN to before me this 17th
day of December, 1990.

Patricia D. Bryant (L.S.)
Notary Public for South Carolina

My Commission Expires: 6-9-98.

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, MILLER W. SHEALY, JR., who being duly sworn, deposes and says that he served the foregoing Brief for Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to David I. Bruck, Esquire, Post Office Box 12249, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 17th day of December, 1990.

MILLER W. SHEALY, JR.

SWORN to before me this 17th
day of December, 1990..

(L.S.)
Notary Public for South Carolina

My Commission Expires: 6-9-98.